IN THE

Supreme Court of the United States

OCTOBER TERM, 1945.

No. 310

JOHN FAKOURI, *Petitioner*,

v.

JOSE MACIEL CADAIS, ET AL., *Respondents*.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT, AND BRIEF IN SUPPORT THEREOF.

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PETITION FOR WRIT OF CERTIORARI.

The petitioner, by his counsel, prays that a writ of certiorari issue to review the judgment of the United States Circuit Court of Appeals for the Fifth Circuit (R. 247) affirming a judgment of the District Court of the United States for the Western District of Louisiana (R. 54-56), which in turn annulled and set aside a judgment of the Twenty-seventh Judicial District Court of the State of Louisiana.

JURISDICTION

The original judgment of the Circuit Court of Appeals was entered on February 22, 1945 (R. 247). Application for rehearing was duly filed by the present petitioner on March 14, 1945 (R. 248), and was denied on May 15, 1945

(R. 264). The jurisdiction of this Court is invoked under Section 240(a) of the Judicial Code as amended by the Act of February 13, 1925.

Questions Presented

1. Whether a foreign official record may be proved in a Federal Court otherwise than in one of the four methods provided in Rule 44 of the Federal Rules of Civil Procedure, entitled "*Rule 44. Proof of Official Record. (a) Authentication of Copy. * * *. (c) Other Proof,*" (and particularly whether Rule 43 (a), entitled "*Rule 43. Evidence. (a) Form and Admissibility,*" authorizes any still additional method of authenticating and proving such a record)?

2. Whether a state statute is an "applicable statute" within the meaning of Rule 44(c), which authorizes the proof of such a record "by any method authorized by any applicable statute or by the rules of evidence at common law?"

Statement

This suit invoked the jurisdiction of the United States District Court for the Western District of Louisiana on the ground of diversity of citizenship. The plaintiffs (respondents in this Court) alleged themselves to be citizens of Brazil (R. 3). The defendant (petitioner in this Court) is a citizen of Louisiana (R. 3, 39).

The plaintiffs, as or in behalf of the alleged sole heirs of decedent Elias Mansaur, sought to annul Mansaur's will of July 21, 1940, and to set aside a judgment of a Louisiana state court which had duly admitted that will to probate and had awarded the decedent's residuary estate to defendant as universal legatee thereunder. The complaint alleged that plaintiff Jose Maciel Cadais and his seven minor brothers and sisters (in whose behalf their mother, Maria Maciel Cadais, as their natural tutrix or guardian was joined as the other plaintiff) were nephews and nieces and sole heirs of decedent Mansaur. (R. 1-10.)

The District Court held the will invalid, and entered judgment for the plaintiffs. It rendered no opinion, and stated no reason other than the brief explanation "because it [the will] does not meet the specific requirements established by our law". (R. 54-56, 175.) While the judgment of the District Court in general terms apparently remands the case to the state court for further consideration of such matters as probate of an earlier 1939 will and consideration of claims of creditors, there also appears on the face of the judgment, a serious question as to whether such a course may not be rendered wholly futile by the conflicting specific provisions of the judgment which go to the extreme of expressly awarding the entire gross inventoried estate of the decedent to the non-resident alien heirs (R. 16-31, 34-35, 43-45, 54-55).

The court below affirmed. It devoted a large part of its original opinion (R. 240-247) and all of its opinion on the motion for rehearing (R. 257-263) to consideration of the validity of the 1940 will. Both opinions show that its consideration and decision of this branch of the case turned wholly on a single narrow and extremely technical question as to the application of a long line of Louisiana cases, four of which were quoted from and discussed in the first opinion, and twelve were cited and considered in the second opinion. Mansaur's will was of a kind known in that state as a "nuncupative will by public act." The state Code (Arts. 1578 ff.) may be summarized as requiring that such a will "be received by the notary, dictated by the testator, written down by the notary, and read to the testator, all in the presence of the witnesses; and that 'express mention' must be made in the will itself that the foregoing requirements have been complied with." *Succession of Vidal*, 44 La. Ann. 41, 10 So. 414. No particular form of words is, however, required, and in some of the cases considered by the court below (e.g. at R. 257-259) the state courts had upheld such wills because it could be "fairly inferred" from the will itself that all formal requirements had been

satisfied. But in the instant case, despite the recurrence of three express references to "in the presence of" the witnesses in the course of this short will which takes just one printed page of the present record (R. 12-13), the court below concluded that the notary's failure to expressly "state that it was dictated to the Notary and by him written down as dictated in the presence of the witnesses" (R. 246) was fatal to the validity of the will.

It is believed that the foregoing brief summary of the general facts of the case will afford a sufficient setting for the statement in the immediately following paragraphs of the specific facts which give rise to the two Federal questions directly presented by this petition.

The alleged relationship of the claimants to decedent, their alleged Brazilian citizenship, the alleged emancipation of plaintiff Jose Maciel Cadais, and the alleged authority of their mother to sue in behalf of the seven other unemancipated minors, were all placed squarely in issue by the pleadings (R. 3-6, 39-41). In support of these several allegations, plaintiffs relied upon some fifteen Brazilian public records, the originals of only two of which were offered in evidence at the trial. Over defendant's objection that the copies about to be described had not been authenticated in accordance with F. R. C. P. Rule 44, the District Court allowed the remaining thirteen records (including one marriage record, eight birth certificates, and one death certificate) to be proved by variously certified copies none of which "contained a certificate that the certifying official was the legal custodian of the original document of which the document offered purported to be a copy". The District Judge in this connection expressly ruled that he would not require that there be a statement by the certifying official that he was custodian of the original record. (R. 83-96, 151, 238.) The records in question were absolutely essential links in plaintiffs' case and constituted the only evidence in support of their allegations of citizenship, heirship, and capacity to sue, and, if they were not properly

authenticated and proved, plaintiffs had no right to stand in judgment and the question of the validity of the will was moot.

The court below affirmed on the ground that Rule 44 should be read in connection with Rule 43(a); that the documents in question would have been admissible in the state courts of Louisiana; and that under Rules 43(a) and 44(c) they had therefore been properly admitted (R. 238-240).

The text of these two Rules is printed below at page 10 of our supporting brief.

Reasons for Granting the Writ.

1. The authentication and proof of official records is a matter of constantly recurring everyday importance in the trial of cases in the Federal courts throughout the country. This Court recognized that importance when it devoted an entire Rule to this one subject. By the same token it is submitted that this Court should now accept this case in order to clear away the serious confusion (as more fully explained in the following two paragraphs of these reasons) created by the cryptic ruling in the opinion below that "Rule 44 should be read in connection with Rule 43(a)" and that "under Rules 43(a) and 44(c) the Court below properly admitted the documents" which are here in question (R. 239-240).

2. To the extent that any of these documents could be deemed to be sufficiently authenticated otherwise than under Rule 44, as for example under *Rule 43(a)*, the decision below is in direct conflict with the decision of the United States Circuit Court of Appeals for the Second Circuit in *United States* v. *Grabina*, 119 F. 2d 863, in which the facts were on all fours with the present facts. There a copy of a Polish marriage certificate authenticated by a local official and by an American vice consul exactly as in the instant case was held incompetent because

"his certificate does not comply with the requirements of Rule 44, Federal Rules of Civil Procedure, * * * because it does not certify that the Mayor of Poreba is the 'lawful custodian' of the record of which exhibit 6 is an 'extract'."

3. If, on the other hand, any of these documents are deemed to be sufficiently authenticated under *Rule 44(c)* it could only be by construing the term "applicable statute" used in that rule as extending to the statutes of a state in addition to those of the United States. In that alternative the decision below would be just as directly in conflict with the clearly indicated intent of the Advisory Committee in drafting the Rules, and by the same token presumably with the intent of this Court in approving the Rules. For the official Note to this Rule in its Report to this Court makes it clear that the Committee was referring to "statutes of the United States," some fifty-two of which it proceeded to specifically cite in that Note. (See section III of our supplemental brief at page 14, below.)

4. Rule 44 provides a well considered and complete scheme for the authentication and proof of foreign official records. The four different alternative methods of such proof which it authorizes (as more fully explained in section I of our supplemental brief at page 12, below) afford ample flexibility to take care of any legitimate purpose. It is most significant that (as shown in section II of our supplemental brief at page 12, below) there runs through those methods which have been approved by this Court in the adoption of Rule 44 the common requirement of a certificate that the initial certifying or attesting officer was the legal custodian of the original record. The decision below strikes out that common requirement. If allowed to stand unreviewed, it will thus definitely undermine and impair the integrity of the whole theory of the Rule which has been approved by this Court. Public policy may well require that a condition such as this which has become so well established

at common law, in our Federal statutes, and now in our Federal Rules of Civil Procedure, should not thus be so nonchalantly tossed aside by the mere *ipse dixit* of the court below, unsupported by any reasoning or explanation of its action (see R. 239-240). Indeed the case at bar itself affords an excellent illustration of the paramount importance of not relaxing the rules for authentication of foreign documents where claims are made or wills are attacked by unknown parties located in a foreign country on another continent. And the importance of maintaining those safeguards will inevitably increase rather than decrease in the aftermath of social, family, and business contacts which are right now arising in constantly increasing volume as a results of the presence abroad of millions of Americans in military and other services.

5. The importance of the two questions presented by this petition is still further enhanced by two other considerations. One is that the effect of the decision below and of its emasculation of Rule 44 is not limited to the proof of foreign official records, but extends equally to the proof in our Federal courts of Federal, state, and local records as well. The other is that (as developed in section IV of our supporting brief at page 14 below) the decision below is simply wrong from the standpoint of the ordinary rules and principles applicable to the construction of statutes or other formal documents.

Wherefore, it is respectfully submitted that this petition should be granted.

JAMES CRAIG PEACOCK,
Counsel for Petitioner.